Filed 6/6/07 P. v. Rocco CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ZEFF GOTTI ROCCO, Defendant and Appellant.	B188291 (Los Angeles County Super. Ct. No. PA050409)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles L. Peven, Judge. Affirmed.

Kiana Sloan-Hillier, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Margaret E. Maxwell and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Zeff Gotti Rocco was convicted by a jury of robbery and carjacking. On appeal, he argues the trial court erred in discharging a juror for consulting outside materials, and for failing to conduct adequate inquiries into allegations of juror misconduct. He also contends the court improperly denied his request for juror contact information. Finally, he argues the court abused its discretion in excluding an exculpatory written statement for lack of reliability. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

On the rainy evening of January 10, 2005, Bizhan Alikhaani went to a coin-operated car wash to meet some friends. His friends did not arrive, but he had a brief conversation with some school acquaintances. As Alikhaani started the ignition of his car, three males approached him. One of the men, appellant, was armed with a gun. Alikhaani described it as a .22-caliber gun. The gun was small, and fit into appellant's palm with only the "top part sticking out." Alikhaani realized it was a "metal real gun" after he heard appellant cock the gun.

Appellant approached the open driver's side window, and hit Alikhaani in the head. Alikhaani got out of the car, and appellant pointed the gun at him. Appellant took Alikhaani's money and cell phone. The three men then attempted, and failed, to open the trunk. Appellant told one of the men to take the car, which he did. Appellant and the remaining man, Mario Alberto Meza, walked away.

Alikhaani reported that appellant was wearing a beanie, a sweatshirt and jeans. He stated that one of the other men also was wearing a beanie. Later, police pulled over appellant for speeding. Meza was the sole passenger. Because appellant and Meza fit the description of the men involved in the robbery and carjacking, police arranged a field show-up. Alikaani positively identified both men. Alikaani's car key was found on the floorboard of appellant's car. Two beanies, a sweatshirt and a jacket, all of which were wet, were found in appellant's trunk.

Appellant was charged with second degree robbery, pursuant to Penal Code section 211,[1] and carjacking, pursuant to section 215, subdivision (a). He also was charged with using a firearm during the commission of the crimes, within the meaning of section 12022.53, subdivision (b). A jury found appellant guilty as charged. He filed a timely notice of appeal.

DISCUSSION

I

Appellant argues that because there was no good cause to discharge Juror No. 7, the trial court violated his federal and state constitutional right to a unanimous jury in doing so. We find no violation of law.

On the third day of deliberations, the jury sent the court a note stating: "Juror [No.] 7 indicated this morning that she had done some 'research' last evening on guns and by reading the Declaration of Independence. Please advise if this research is an issue. [¶] Also, we have reached a decision on the carjacking but are split 11 to 1 on the robbery and use of a gun. Juror [No.] 7 is the minority. [¶] How do we handle the situation where we agree on the carjacking but can't agree on the use of a gun?"

At an in camera hearing, the court questioned the jury foreman. The foreman explained that Juror No. 7 "didn't say a great deal. She just said that she had looked into guns a little bit. And she talked about a .25[2] caliber gun and how it would fit into a hand, and what it would look like. So she had done—beyond that, we realized that wasn't appropriate. And so we asked her not to discuss it any further. So we didn't get any more information from that. So she also said she read the Declaration of Independence and that in the spirit of what she read in the Independence—the Declaration of Independence, that was impacting how she was going to vote and what she was

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[1] All further statutory references are to the Penal Code.

[2] Juror No. 7 researched a .22-caliber gun.

deciding." The foreman confirmed that Juror No. 7's research was about gun size, and how a gun would fit into the hand. In response to the prosecutor's questions, the foreman stated that Juror No. 7 had said that her vote was going to be affected by what she read in the Declaration of Independence, not the law given to her by the court. Appellant's counsel chose not to ask the foreman any questions.

The court then questioned Juror No. 7. The court explained why she was brought into chambers and asked, "Have you done anything? What's this all about?" The following colloquy then occurred:

"JUROR NO. 7: People generally have the idea that a .22 is a small weapon as well as I have that thought. I—all I did was go to the computer to see whether or not it was true. It had nothing to do with the case, just the idea that the caliber is the size. Because I'm not a handgun person. And it had nothing to do with the case. My opinion, my verdict if you will, hasn't changed one bit. It had nothing to do with the case.

"THE COURT: The problem is, the problem is—and, well, before I get into that, [the foreman] also said that you had been telling the jury or you told the jury that you have read the Declaration of Independence and that the Declaration—your reading of the Declaration of Independence is somehow impacting your decision making on the case and your verdict on the case.

"JUROR NO. 7: Well, I'm not very popular right now because I'm the hold out. . . . There is a lot of pressure on me. They wanted me to change my verdict yesterday. I said I will think—rethink this again. And this morning nothing has changed.

"THE COURT: I understand all of that. . . . You are entitled to hold your position. . . . But I'm talking about now the reference to the Declaration of Independence.

"[¶] . . . [¶]

"JUROR NO. 7: No. I just reviewed the purpose.

"THE COURT: What about the Declaration of Independence?

"JUROR NO. 7: The purpose, the purpose, our purpose in this country. Purpose, that was it.

"THE COURT: Did you, while you have been a juror on this case and for purpose of learning something or . . . perhaps aiding your decision making process or anything, have you read the Declaration of Independence?

"JUROR NO. 7: For that purpose, no.

"THE COURT: Well, why did you read the Declaration of Independence while you have been a juror on this case and deliberating on this case? Why did you read it?

"[¶] . . . [¶]

"JUROR NO. 7: It's a good question. That's a very good question. . . . I don't know. I only know that my verdict didn't change, has not changed from the beginning.

"THE COURT: That's fine. You are entitled to hold a verdict. . . . Well, the instruction says that you must decide all questions of fact in this case from the evidence received in this trial and not from any other source. Now you have already told me now that you've read the Declaration of Independence. That's another source. And you have gone onto the computer regarding guns. . . . Why did you go on the computer?

"JUROR NO. 7: The size of the gun.

"THE COURT: For guns?

"JUROR NO. 7: For my own information. Nothing to do—with the size of the weapon, that came up as a secondary question. People believe that the caliber denotes the size of the gun. I believed that, too. Had nothing to do with the weapon in this case, because to begin with I didn't believe there was a weapon. So why would I be interested in finding out about it? I didn't believe there was a weapon. . . . And I didn't do any research on a weapon.

"THE COURT: Well, you did research for the size of a weapon.

"JUROR NO. 7: For the sake of—but not for the sake of the case, for my own information. Had nothing to do with the victim or the defendant. That was a curiosity. And I have access to those things.

"THE COURT: You must not independently investigate the facts or the law. . . . Or consider or discuss facts as to which there is no evidence. This means, for

example, that you . . . you must not consult reference works for additional information. And you've done that.

"JUROR NO. 7: I don't belie[ve] I did, Your Honor.

"[¶] . . . [¶]

"THE COURT: Why would you suddenly become curious about guns if not in connection with this case? You are sitting here as a juror and the issue is the gun.

"[¶] . . . [¶]

"JUROR NO. 7: I never—I have not changed my opinion.

"THE COURT: If you don't believe he had a gun . . . then what difference would it make about the size of the gun?

"JUROR NO. 7: That's just a curiosity on my part is a .22 smaller? People always call it a woman's gun. Is it a woman's gun? I don't know much. . . . It's a general bit of information, Your Honor. Has nothing to do with the gun since I don't believe there was one and that hasn't changed from the beginning. And that's the truth. . . .

"[¶] . . . [¶]

"THE COURT: I believe that you have violated my instruction. And I believe that you've done that to the extent that you have told me now you have consulted the computer, and you have also, for whatever reason, you can't give me really any reason why, but you have read the Declaration of Independence. And these are things that you are not supposed to do in connection will your roll [*sic*] as a juror in this case."

The court found that Juror No. 7 violated CALJIC Nos. 1.00 (respective duties of judge and jury) and 1.03 (juror forbidden to make any independent investigation). The court stated: "I find it's [a] question of credibility . . . and I find there is, there is a difference in the credibility between the foreperson and, and the juror here. And I find the foreperson quite credible. And I find her explanations of why she suddenly decided to go on the Internet to check about guns and why she suddenly decided to read the Declaration of Independence, that she had this need to do this, I find it somewhat

disingenuous. And I don't believe she is being entirely truthful with the court." The court then discharged Juror No. 7, and replaced her with an alternate juror.

"The California process for substitution of jurors under Penal Code section 1089 and Code of Civil Procedure section 233 preserves the essential features of the jury trial required by the Sixth Amendment and due process clause of the Fourteenth Amendment." (*People v. Bowers* (2001) 87 Cal.App.4th 722, 729.) In relevant part, section 1089 states: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, . . . the court may order [him] to be discharged and draw the name of an alternate. . . ."

"A juror's misconduct is good cause which, under [section 1089], may permit the court to replace him or her . . . ." (*People v. Diaz* (1984) 152 Cal.App.3d 926, 934.) "In appropriate circumstances a trial judge may conclude, based on a juror's willful failure to follow an instruction, that the juror will not follow other instructions and is therefore unable to perform his or her duty as a juror." (*People v. Ledesma* (2006) 39 Cal.4th 641, 738.) "A trial court's decision to discharge a juror for misconduct is reviewed for abuse of discretion, and is upheld if supported by substantial evidence. [Citations.] The juror's inability to perform must '"'appear in the record as a demonstrable reality.'"'" (*Id.* at p. 743.)

Appellant argues that good cause did not exist because Juror No. 7 consulted outside materials "well after her decision had been made." He emphasizes that her decision to consult these materials was unrelated to the case and would not have affected her vote. Appellant further claims that the court yelled at Juror No. 7, that the jury was trying to replace Juror No. 7 because she was a holdout, and that Juror No. 7 was discharged because she had doubts about the sufficiency of the prosecution's evidence.

The trial court had good cause to discharge Juror No. 7. Although she claimed that her reading of the Declaration of Independence and her research on guns had nothing to do with the case, there was substantial evidence to suggest otherwise. The victim of the robbery and carjacking described the gun as a small .22-caliber gun. He also said that

it fit into the palm of the gunman's hand, with only the "top part sticking out." After hearing this evidence, Juror No. 7 researched the size of a .22-caliber gun, including how the gun fits into the hand. Then, during jury deliberations, she announced that she had researched the size of a .22-caliber gun before she was cut off by the other jurors.

Juror No. 7's research on the same caliber gun involved in the charged crimes; her research on facts of the case, including gun size and how the gun fit into the hand; the timing of her research, after telling the jury that she would "rethink" the issue overnight; her inability to explain why she read the Declaration of Independence if not in connection with the case; her decision to come in the next morning and tell the other jurors about her consultation of outside materials; and her expressed intent to allow her reading of the Declaration of Independence affect her vote is substantial evidence that she willfully violated CALJIC No. 1.03.[3] "[C]onsciously receiv[ing] outside information" is juror misconduct, as is "shar[ing] improper information with other jurors." (*In re Hamilton* (1999) 20 Cal.4th 273, 294.) The record shows, to a demonstrable reality, that Juror No. 7 was unable to perform her duty as a juror. We, therefore, reject appellant's argument that Juror No. 7 was discharged because she was a holdout, and because she doubted the sufficiency of the prosecution's evidence.

With regard to appellant's claim that the court yelled at Juror No. 7, the court strongly denied this allegation. Although appellant claims that in yelling at the juror, the court "badgered Juror No. 7" and "'improperly affected the independent role of the jury,'" we disagree. The record shows that the court properly questioned both the foreman and Juror No. 7. The court began its inquiry of the foreman by stating, "I don't want to get involved in your deliberations or how you are voting or anything like that."

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[3] The modified version of CALJIC No. 1.03 given to the jury reads: "You must decide all questions of fact in this case from the evidence received in this trial and not from any other source. [¶] You must not independently investigate the facts or the law or consider or discuss facts as to which there is no evidence. This means, for example, that you must not on your own visit the scene, conduct experiments, or consult reference works or persons for additional information. . . ."

And the court's questions were narrowly tailored to elicit only the facts surrounding Juror No. 7's gun research and reading of the Declaration of Independence. When Juror No. 7 volunteered information regarding the deliberations, the court refocused her back to her consultation of outside materials, and continually told her that she was entitled to maintain her minority vote. The court did not abuse its discretion.

Finally, appellant argues the court erred in failing to question the other jurors regarding Juror No. 7's misconduct, and to inquire into whether the remaining jurors' "ability to render a true verdict" had been affected. "Once a court is put on notice of the possibility that improper or external influences are being brought to bear on a juror, it is the court's duty to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and whether the impartiality of other jurors has been affected." (*People v. McNeal* (1979) 90 Cal.App.3d 830, 839.)

The court's inquiry was sufficient. The court thoroughly questioned both the foreman and Juror No. 7. After doing so, it was apparent there was no dispute that Juror No. 7 had researched the size of a .22-caliber gun, read the Declaration of Independence, and then told the jury about it. According to the foreman, the jury realized that Juror No. 7's consultation of outside materials was improper and cut her off before she could say anything more. And as respondent points out, none of the other jurors could have shed any light on Juror No. 7's subjective intent for consulting the materials and whether the materials would affect her vote. We find no error.

II

Appellant argues the court erred in failing to conduct an adequate inquiry into whether Juror No. 9 was sleeping during the reading of jury instructions. As the court was giving the instructions, appellant's counsel asked to approach the bench. In the unreported bench conference, counsel informed the court that Juror No. 9 was sleeping. The court stated that it would carefully watch the juror. A little later, counsel asked to approach the bench again, stating, "we have the same issue." The court replied, "No, I don't think it's necessary. You can talk about something. And I've been observing. And I don't see the issue [counsel]." After the jury was excused to deliberate, appellant's

counsel asked the court to conduct an inquiry into whether Juror No. 9 had been sleeping. Counsel stated, "[i]t was so obvious that Juror [No.] 10 was staring, looking at him, looking at me, to let me know he was, he was asleep. Juror [No.] 11 was doing the same, and alternate [Juror No.] 2."

The court denied his request, stating, "I saw the jurors. The man has been hunched over half the trial. He has been complaining, apparently, about his back. And he's been hunched over throughout half the trial . . . . The man, I observed him, I observed all the jurors, keeping an eye on all the jurors. All the jurors appear to be awake. The fact that somebody closes their eyes from time to time, does not mean that they are sleeping. Does not mean that the person is sleeping."

"'Once a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty "to make whatever inquiry is reasonably necessary" to determine whether the juror should be discharged. . . . [H]owever, that the mere suggestion of juror "inattention" does not require a formal hearing disrupting the trial of a case. [Citation.]' [Citation.] [¶] '"The decision whether to investigate the possibility of juror bias, incompetence, or misconduct—like the ultimate decision to retain or discharge a juror—rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial."' [Citation.] A hearing is required only where the court possesses information which, if proved to be true, would constitute 'good cause' to doubt a juror's ability to perform his or her duties and would justify his or her removal from the case. [Citation.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1348.)

In *People v. DeSantis* (1992) 2 Cal.4th 1198, 1233-1234, the Supreme Court held that a formal hearing on allegations of sleeping jurors was not required because the trial court's "self-directed inquiry," which involved closely observing jurors to determine whether they were asleep, and determining that none was sleeping although some of the jurors occasionally had their eyes closed, was adequate.

Similarly, after the unreported bench conference, the trial court stated that it would conduct an inquiry by carefully watching Juror No. 9. Upon observation, the court noted

that the juror was not sleeping and declined to conduct further inquiry. The court did not abuse its discretion. (See also *People v. Bradford, supra*, 15 Cal.4th at p. 1349 [holding that "the absence of any reference in the record to the juror's inattentiveness over a more substantial period indicates that the trial court did not abuse its discretion in failing to conduct an inquiry"].) Further, we see no prejudice given that the jury requested and received a copy of the jury instructions.

III

Appellant argues the court erred in denying his request for juror contact information. He contends there was good cause for disclosing the contact information because various instances of juror misconduct required further investigation. To his request, appellant attached declarations from his family and friends claiming that some jurors, and the judge, were sleeping during the trial. Appellant also claimed that the court yelled at Juror No. 7 for consulting outside materials, and argued Juror No. 7 was improperly discharged. Appellant attached a declaration from Juror No. 7 in which she cited new reasons for why she consulted the materials.

"The statutes pertaining to the confidentiality of juror identifying information, and a juror's right to refuse to discuss a case after verdict, are found in sections 206 and 237. . . . [¶] . . . [¶] 'Section 237, originally enacted in 1992 and amended three times since then, now provides that the names, addresses and telephone numbers of jurors shall be sealed automatically following completion of a criminal trial. . . . In amending section 237 in 1995, the Legislature declared: "The Legislature finds and declares that jurors who have served on a criminal case to its conclusion have dutifully completed their civic duty. It is the intent of the Legislature in enacting this act to balance the interests of providing access to records of juror identifying information for a particular, identifiable purpose against the interests in protecting the jurors' privacy, safety, and well-being, as well as the interest in maintaining public confidence and willingness to participate in the jury system."'" (*People v. Santos* (2007) 147 Cal.App.4th 965, 976-977.)

"'Thus, . . . sections 237 and 206, as presently written, require that the personal information of jurors, such as their names, addresses and telephone numbers, be sealed

automatically following the recording of the verdict in a criminal case. (§ 237, subd. (a)(2).) "Any person" seeking such information must petition the court and show good cause for disclosure. (*Id.*, subd. (b).) More specifically, a criminal defendant or defense counsel may obtain this information if he or she petitions the court and demonstrates such information is "necessary" for a new trial motion or "any other lawful purpose." (§ 206, subd. (f).)'" (*People v. Santos, supra*, 147 Cal.App.4th at p. 977.) "Denial of a petition filed pursuant to section 237 is reviewed under the deferential abuse of discretion standard." (*Id.* at p. 978.)

As previously discussed, the court conducted an adequate inquiry into the misconduct of Juror No. 7, and the alleged misconduct of Juror No. 9. Although appellant's family and friends claimed, after the verdict, that the judge and some jurors were sleeping, the only allegation of sleep during the trial was with regard to Juror No. 9 during the reading of jury instructions. And the court vehemently denied that anybody was sleeping: "It's not true, and saying these things does not make it so. . . . I wasn't sleeping through the trial. I heard this trial. I have got extensive notes. I know exactly what took place during the course of the trial. Didn't sleep through the trial. I heard the evidence. Jurors heard the evidence in this trial. And that's what happened." The court did not abuse its discretion in finding that this did not constitute good cause to unseal and disclose juror contact information.

Prior to being discharged, Juror No. 7 was thoroughly questioned about why she consulted outside materials. She stated that she did not know why she read the Declaration of Independence, and stated that she researched the size of a .22-caliber gun because of mere curiosity. But in the declaration attached to appellant's request for juror contact information, she gave a different and more elaborate explanation as to why she consulted the materials. The court reasonably doubted her credibility. And even if the new explanations she offered were true, she did not deny that she consulted the outside materials and then told the other jurors about it. There was no good cause to disclose juror contact information on the basis of investigating this issue any further.

IV

Appellant argues that the court erred in excluding a statement written by Meza, one of the other men involved in the robbery and carjacking. During trial, appellant sought to admit a document purported to have been written by Meza, inculpating himself and exculpating appellant from the charged crimes. By the time of appellant's trial, Meza had pled guilty and was awaiting sentence. Appellant's counsel stated that he did not know when the statement was written, but that he was sure it was written prior to Meza pleading guilty. Meza exercised his Fifth Amendment right against self-incrimination and refused to testify.

Appellant argued that because the statement was against Meza's penal interests when made, it should be admitted as an exception to the hearsay rule. The prosecutor argued that the statement lacked reliability and questioned whether the statement was really against Meza's penal interests since it had not been given to the prosecution until after Meza had pled guilty. Appellant's counsel indicated that the statement was written in appellant's presence, and stated that appellant would testify regarding how "it was generated." Counsel also submitted a copy of Meza's driver's license to prove that the signature on the statement was authentic. The court found that the statement was unreliable, and ruled that the statement, and any testimony regarding its contents, were inadmissible.

Evidence Code section 1230 states: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

"The proponent of such evidence must show 'that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was

sufficiently reliable to warrant admission despite its hearsay character.' [Citation.] A trial court determining whether the proffered evidence is sufficiently reliable '"may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant."' [Citation.]" (*People v. Lucas* (1995) 12 Cal.4th 415, 462.) We review the trial court's determination of reliability for abuse of discretion. (*People v. Brown* (2003) 31 Cal.4th 518, 536.)

We find no error. The statement was written by Meza, appellant's friend. Even if the statement was made prior to Meza pleading guilty, Meza was positively identified by Alikhaani as one of the men involved in the robbery and carjacking. The only witness to the statement was appellant, and Meza refused to testify. Given the author of the statement, and the circumstances surrounding how the statement was made, the court did not abuse its discretion in excluding it based on lack of reliability.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.